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NO. 85-2164

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALTER D. AMES AND MARION L. AMES

Petitioners,

vs.

STANDARD OIL COMPANY (INDIANA),

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S RESPONSE TO MOTION REQUESTING AWARD OF SANCTIONS

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Dated: September 25, 1986

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MOTION REQUESTING AWARD OF SANCTIONS

Petitioners, Walter D. and Marion Ames, respectfully oppose a Motion by respondent Standard Oil Company (Indiana) requesting an award of double costs and attorneys' fees. Such motion is based on an expurgated quotation clipped by Standard Oil to mask the clear distinction between its case law and the facts at bar.

While petitioners vigorously contest Standard Oil's motion, they hopefully do so with a brevity amounting to laconicness compared to Standard Oil's motion. If the petition for certiorari is so frivolous, why does it take Standard Oil five (5) pages of citations to prove it? Although protesting that petitioners have unreasonably and vexatiously multiplied proceedings, has not Standard Oil done just that? Can this Court imagine the effect on its docket were there a proliferation of Standard Oil's who have the ability to

overwhelm opposing litigants with motions demanding everything perhaps short of a public lynching, rather than simply opposing the grant of certiorari?

More important, how ver, is Standard Oil's deliberate omission of a vital part of a quote, which itself merits an award of costs and attorney's fees to petitionere -- and a grant of the petition.

I. STANDARD OIL'S MOTION IS BASED ON ITS MISINTERPRETATION OF THE ISSUE

Standard Oil bases its motion on the contention that petitioners' failure to include a district court decision dismissing the entirety of the action for petitioners' failure to go to arbitration, constitutes a breach of petitioners' duty to this Court. Respondent neglects to recognize that the sole issue on which the petition for certiorari is based is phrased at pages 10 and 11 of the petition:

> Petitioners recognize the temporal exigencies that bear on this Court. They do not seek a full examination on the merits. Instead, the utter denial of discovery to petitioners here is submitted to be a violation oi due process that this Court can correct without a large expenditure of its time.

That is the basis of the petition, and the appendix meshes with that issue alone. As a consequence, petitioners limited their appendix to those papers they believed were necessary to have this Court understand that despite all pending discovery requests,[1/] the lower court simultaneously granted summary judgment against petitioners on the contract claim and sent that claim to arbitration, while denying other claims that are not arbitrable -- all without discovery.

1/ And despite a motion for a pretrial conference and a motion for leave to take discovery.

In particular, petitioners complied with Rule 21.1(d) and (k) where they concern the issue on appeal and, of course, appended a copy of the judgment of the U.S. Court of Appeals sought to be reviewed. More specifically, petitioners complied with Rule 21.5, which states: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." That is what petitioners did, based on their knowledge of the time this Court can devote to any petition for certiorari and, most important, the point requiring consideration and on which the petition is based.

Standard Oil says "... that the order properly on review is the July 1985 dismissal [of the District Court] for failure to prosecute...." [Motion 9] That is Standard Oil's concept of the issue, not petitioners'. In effect respondent seeks to inject its own issue of appealability of a interlocutory order after a dismissal for failure to arbitrate. If Standard Oil wishes to take such a position, and that argument requires a supplemental appendix, it may add such appendix. However, Standard Oil's position is in error and it knows it.

II. AN INTERLOCUTORY ORDER IS APPEALABLE AFTER A FINAL JUDGMENT HAS BEEN ENTERED

Beginning on page 11 of its Opposition to Certiorari,[2/] Standard Oil has a section entitled, Petitioners are not now entitled to seek review of the 1984 interlocutory orders. It says petitioners did not proceed to arbitration (they could not, as will be explained *infra*); now it says the interlocutory order denying them discovery *in toto* is not subject to appeal.

2/ Apparently incorporated by reference in its motion.

Standard Oil knows there is a marked distinction between the primary case it cites in its Opposition to Certiorari at p. 12 and the facts here, yet deliberately distorts the case and its quotation from it. That case is Ash v. Cvetkov, 739 F.2d 493, 497 (9th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1368 (1985). To show what Standard Oil has done, the full quote at its Opposition p. 12 is repeated, with the expurgated portion underlined.

> It would be unwise to encourage all would-be appellants from interlocutory orders to delay for the purpose of dismissal for lack of prosecution and review of otherwise unreviewable decisions. We agree with Hughley v. Eaton Corporation that the sufferance of dismissal without prejudice because of failure to prosecute is not to be employed as an avenue for reaching issues which are not subject to interlocutory appeal as of right.

That part of a single sentence which Standard Oil omitted shows the falsity of its position. The underlined words were omitted because they show that the case is inapplicable, and Standard Oil wanted to hide that fact. All Ash and the cases on which it relies say is that where there is a dismissal without prejudice for failure to prosecute, one cannot on appeal reach prior interlocutory orders. The action at bar is a dismissal with prejudice, and the way that Standard Oil avoids the distinction is to hide it.

The difference between appealing interlocutory orders following a dismissal with or without prejudice is apparent. If interlocutory orders are subject to appeal after a dismissal without prejudice, such a dismissal could be used as a ploy for obtaining interlocutory review, then reinstituting the action. That is a poor ploy on final judgment. Standard Oil should explain to this Court why it placed four dots on page 12 of its

Opposition to the petition for certiorari if not to mask the clear difference between the case it was quoting and the facts at bar. If anything merits an award of sanctions, cutting a quote to give it a different meaning does.

The U.S. Court of Appeals for the Federal Circuit recognized the rule of appealability of interlocutory orders as recently as Glaros v. H. H. Robertson Co., ___ F.2d ___, 230 USPQ 393, 399 (Fed. Cir. July 22, 1986) when it held, citing other courts of appeals but not this Court, "A Rule 56(d) order granting partial summary judgment from which no immediate appeal lies is merged into the final judgment and reviewable on appeal from that final judgment." In common sense, were interlocutory orders not appealable after final judgment, they would constitute a new breed of non-appealable orders.

III. OTHER ISSUES RAISED BY RESPONDENT'S MOTION

Other issues have been raised by Standard Oil that may merit the interest of this Court. They were not put forth in the petition because petitioners believe that utter denial of discovery and then granting summary judgment on the bases of Standard Oil's factual allegations[3/] was so egregious as to warrant the grant of the petition. However, because of the opposition to the petition and Standard Oil's motion, certain other issues that may be of interest are manifest:

1. Is dismissal for failure to prosecute a case an abuse of discretion when the order on which dismissal is based is impossible of compliance?

Such is the case here. In its memorandum opinion and order filed July 26, 1984 [A-4 to A-21 appended to the petition], the

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3/ E.g., that Standard Oil only had 39% of the Class A common stock or that Standard Oil never made any writing regarding its oral promise to make a tender for shares.

district judge ordered plaintiff to arbitration. [A-20] The difficulty is that at A-10 the court had said, "Further, defendant's motion for summary judgment on the breach of contract cause of action will be granted since plaintiff may not claim that the language of the agreement requiring more than 40% ownership of Class A common means ownership of shares other than Class A common since it is inconsistent with the language of the contract." So, the district court told plaintiffs to arbitrate that which it had just determined. There was nothing to arbitrate, and Standard Oil knows it. Why the Court of Appeals would not consider this question is not imaginable.

2. Does the flexible rule that "a promisor may assert against a beneficiary any defense that he could assert against the promisee if the promisee were suing on the contract," Schneider Moving & Storage Co. v. Robins, ___ U.S. ___, 104 S.Ct. 1844 (1984) apply to a donee, rather than a creditor beneficiary, who has but bare knowledge of the facts? It is submitted that whatever the general rule, and this Court held that it should not be applied so inflexibly as to defeat the intentions of the parties, it is not applicable here, where petitioners were not even furnished with a full copy of the agreement under which they were beneficiaries on discovery,[4/] and denial of discovery left them at the mercy of a promisor who had complete knowledge and documents. Since this Court has as recently as Schneider Moving & Storage Co. considered the applicability of the rule, it may consider extending it to donee beneficiaries who never consented to arbitration and against whom arbitration would be particularly onerous.

4/ They were given a copy of the agreement noblesse oblige outside of discovery.

3. The U.S. Court of Appeals for the District of Columbia Circuit failed to follow its own precedent regarding interlocutory appeals. After the district court order granting summary judgment [A-4 to A-21], petitioners appealed to the U.S. Court of Appeals, relying on Lee v. Ply*Gem Industries, Inc., 593 F.2d 1266 (D.C. Cir. 1979) to show why that order, although interlocutory, was appealable. The appeal was dismissed by order filed January 9, 1985. It did not mention Lee v. Ply*Gem. Plaintiffs petitioned for rehearing, tactfully referring, inter alia, to Lee v. Ply*Gem as being a case more recent than those cited by the Court of Appeals. The petition was denied per curiam without comment.

Imagine plaintiffs' amazement when, later in that same year, 1985, a different panel in Noxell Corp. v. Firehouse No. 1 Bar-B-Que Resturant, 771 F.2d 521, 527 (D.C. Cir. 1985) not only called Lee v. Ply*Gem "the controlling decision of this court on appealability," but assessed counsel fees against a lawyer who failed to address Lee v. Ply*Gem. One panel refuses to cite the case and a half year later another panel calls it controlling. The issue should be remanded for en banc determination.

4. Presuming that the precise terms of a contract will be enforced when there is no ambiguity at the time the contract is made, can parol evidence be received when an ambiguity arises by virtue of later acts? Expressed differently, if a patently unambiguous contract is to be given its plain meaning, does that rule apply when a latent ambiguity arises by acts committed after the contract was made? Petitioners believe that they were entitled to discovery concerning later acts -- the issuance of stock convertible into Class A common -- although the contract specifying 40% of Class A common was not ambiguous at the time

it was written, because at that time there was no convertible stock.

IV. THE SUPREME COURT'S POWER TO PUNISH

Of course this Court has the power to punish frivolous pleadings under Rule 49.2. This, however, is a case where the petition should be granted. Rather than being frivolous or omitting relevant facts, it is Standard Oil's motion requesting an award of sanctions that is not only frivolous but deceitful.

In Talamini v. All-State Insurance Co., ___ U.S. ___, 105 S.Ct. 1824 (1985), which appears to be the most recent case of this Court interpreting Rule 49.2, sanctions were denied although an appeal had been improperly taken. In a concurring decision, four members of the Court[5/] believed that the motion under Rule 49.2 should be denied and that the appeal should have been treated as a petition for a writ of certiorari and denied.

Emphasizing that "Freedom of access to the Courts is a cherished value in our democratic society,"[6/] the concurring justices said that any "evenhanded attempt to determine which of the unmeritorious applications should give rise to sanctions, and which should merely be denied summarily, would be a time-consuming and unrewarding task."[7/] The decision then gives examples of gross abuse of the judicial process: petitioning to generate a fee or to delay proceedings. Counsel here did not petition for certiorari to generate a fee -- counsel is his own client. Nor has the petition

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5/ A fifth justice was of the opinion that, since there was no final judgment to review, the appeal should be dismissed for want of jurisdiction.

6/ 105 S.Ct. at 1827.

7/ Id.

been filed for the purpose of delay -- there is no award of damages which has been stayed pending consideration of the petition. This is a case where if petitioners were wrong, or if complete lack of discovery is not an issue this Court wishes to address, the petition should simply be denied.

The same is not true of Standard Oil's motion. It was designed to harass: to generate work -- for this Court, for petitioners, and for itself. Imagine the time Standard Oil's law firm spent on all those citations! Then, having come up empty-handed and knowing that interlocutory orders merge into a final judgment with prejudice, all Standard Oil could do was expurgate the language that exposed its position ... and swamp the Court with words and citations. It was successful below with such tactics. It is sincerely pleaded that this Court not succumb as well.

V. CONCLUSION

Standard Oil's motion has caused petitioners to do just what they did not wish to do: to muddy the waters of what they believe is a clear issue: is it a violation of due process arbitrarily to deny all discovery to a party, then grant summary judgment on the issues as to which discovery was sought? It is respectfully petitioned that Standard Oil's strategy of moving for an award of costs and attorney's fees at every turn should not prevail, and that Standard Oil be sanctioned for a deliberate omission of a portion of a quotation which, if quoted, would have shown that the case was inapplicable to the present facts. In any case, Standard Oil's motion should be denied, certiorari granted and the action remanded with instructions that petitioners be granted full and complete

discovery prior to entertainment of any motion for summary judgment.

Respectfully submitted,

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Attorney for petitioners
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Dated: September 25, 1986

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 1986 the foregoing Petitioner's Response to Motion Requesting Award of Sanctions was served on respondent, Standard Oil Company (Indiana) by sending a copy to Thomas D. Yannucci, Kirkland & Ellis, 655 Fifteenth Street, N.W., Washington, D.C. 20005, attorneys for respondent, by first-class, postage-prepaid mail.

Walter D. Ames